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in the

Supreme Court

of the

United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida Corporation,
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA, A Florida Municipal Corporation,
Respondents.

On Petition for Writ Of Certiorari From The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

DEBORAH J. MILLER, Esquire
SIMON, SCHINDLER & HURST, P.A.
1492 South Miami Avenue
Miami, Florida 33130
305/358-8611
Attorney for Petitioners
ROBERT T. VAUGHN, Esquire
of Counsel
1111 Stahlman Building
Suite 1111
Nashville, Tennessee 37201
615/242-2550

QUESTIONS PRESENTED FOR REVIEW

The constitutionality of the Model Drug Paraphernalia Act, as promulgated by the United States Department of Justice and adopted by the Respondents herein, has been extensively challenged in the lower courts, resulting in a wide disparity of opinions among the Federal District and Circuit Courts. As the controversy grows and the conflicting United States District Court decisions continue to be heard by the Federal Circuit Courts, this case presents the following questions for review:

A. The Homestead Ordinance defines "drug paraphernalia" as all equipment, products, and materials of any kind which are used, intended for use, or designed for use in connection with a controlled substance. Does the phrase "designed for use" result in guilt through transferred intent of the designer, thus denying an accused violator due process of law?

B. Is the phrase "designed for use" as used to define "drug paraphernalia" unconstitutionally vague in that the merchants cannot tell whether items capable of lawful uses are within the ordinance's prohibitions? Further, does such vagueness permit arbitrary and discriminatory enforcement?

C. The definition portion of the Homestead Ordinance contains a listing of factors which, in addition to all logically relevant factors, may be considered in assessing whether a defendant has the requisite criminal intent. Is

the following factor unconstitutionally vague and provide a vehicle for arbitrary and discriminatory enforcement?:

Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

D. The violations portion of the Homestead Ordinance, in part, renders it unlawful to deliver or possess with intent to deliver "drug paraphernalia", knowing, or under circumstances where one reasonably should know it will be used in connection with controlled substances. Further, advertising where one knows, or under circumstances where one reasonably should know its purpose, in whole or in part, is to promote the sale of objects designed or intended for use as "drug paraphernalia" is prohibited. Does the permissibility of a conviction merely because one "reasonably should have known" deny an accused due process by failing to require specific intent?

E. Is the aforementioned prohibition of an advertisement which, in whole "or in part," promotes the sale of objects designed or intended for use as "drug paraphernalia" overbroad in its infringement upon protected political speech, as well as its lack of geographic limits on its applicability?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, entered on June 10, 1982, appears in the Appendix, (A. 80). The Eleventh Circuit in the instant case relied exclusively upon *Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood* and *Florida Businessmen for Free Enterprise, Inc. v. Florida*, consolidated case Nos. 80-5769 and 80-5813, (11th Cir. 4/23/82). (Hereinafter referred to as *Florida Businessmen for Free Enterprise, Inc. v. Hollywood*). The opinion in these consolidated cases appears in the Appendix, (A. 46-79).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision below was rendered on June 10, 1982. No rehearing was requested. On August 31, 1982, this Court granted an Extension of Time within which to Petition for Certiorari to October 8, 1982. Jurisdiction to review this judgment by Writ of Certiorari is conferred by 28 U.S.C. §1254(1). Certiorari review is appropriate because the case involves important questions of federal law which have not been, but should be settled by this Court. Further, this decision of the Eleventh Circuit Court of Appeals directly conflicts with decisions of the Sixth and Seventh Circuits, as well as with a multitude of Federal Courts below.

CONSTITUTIONAL PROVISIONS, STATUTES & ORDINANCES INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech. . . .

Fourth Amendment, United States Constitution:

> Section I. ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Ordinance No. 80-04-28, City of Homestead Code of Ordinances, is set forth in the Appendix, (A. 1-10).

STATEMENT OF THE CASE

The Model Act

In the fall of 1979, the United States Department of Justice drafted a "Model Drug Paraphernalia Act" (Model Act) as a proposal for lawmakers nationwide to adopt in an effort to limit access to and possession of drug paraphernalia, as well as information relating thereto. The City of Homestead adopted the Model Act.[1]

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[1]The Model Act is codified in Ordinance No. 80-04-28, City of Homestead Code of Ordinances. (A. 1-10).

The Homestead Ordinance possesses four components. First, the term "drug paraphernalia" is defined to include "all equipment, products and materials of any kind which are used, intended for use, or designed for use" in connection with a controlled substance.[2] The second component provides that the term "drug paraphernalia" includes, but is not limited to the aforementioned definition. Following this second aspect of the definition is a supplemental list of many common items that can be paraphernalia if "used, intended for use, or designed for use" to violate drug laws.[3] Third, the ordinance enunicates several relevant factors which "may be considered" in determining whether the necessary criminal intent is present, so as to render an object illicit paraphernalia.[4]

The final portion of the ordinance contains three substantive offenses. These provisions proscribe, in relevant part, the manufacture or delivery of drug paraphernalia by one knowing, or under circumstances where one reasonably should know, that the paraphernalia will be used in connection with a controlled substance.[5] It is further unlawful to place an advertisement knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.[6]

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[2]Homestead Ordinance §29-58.1 D.; (A. 4).

[3]Homestead Ordinance §29-58.1 D. 1.-12.; (A. 4-6).

[4]Homestead Ordinance §29-58.1 E., 1.-14.; (A. 7-8).

[5]Homestead Ordinance §29-58.3.; (A. 8-9).

[6]Homestead Ordinance §29-58.4.; (A. 9).

Violation of this ordinance's provisions may result in a fine up to five hundred dollars ($500.00), or imprisonment up to ninety (90) days, or both. Each day on which a violation occurs constitutes a separate offense.[7]

Proceedings in the Courts Below

This action was commenced in the United States District Court for the Southern District of Florida, pursuant to 42 U.S.C. §1983 by a Complaint for Declaratory and Injunctive Relief filed on May 14, 1980. On June 5, 1980, an Amended Complaint was filed to include additional parties. (A. 11-23). Jurisdiction was conferred upon the Court by 28 U.S.C. §1343.

The Amended Complaint alleged that printed materials and commercial speech were impermissibly prohibited by the ordinance. (A. 14-17). The ordinance was further assailed as vague and failing to provide sufficient warning of what items or conduct are prohibited, thus permitting arbitrary and discriminatory enforcement. (A. 15). Items possessing overwhelmingly legal uses were asserted to fall within the law's ambit without a sufficient stated governmental interest to support this prohibition. (A. 14-16). By Motion for Summary Judgment, memorandum and oral argument, Petitioners expounded their challenges, asserting that the standard of intent is vague and that it permits a conviction based upon the intent of another.

Through Cross-Motions for Summary Judgment, both sides represented the nonexistence of any disputed

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[7] *Id.*

issue of material fact on which the other party might rely. (A. 24-30).

The District Court entered a Summary Judgment and, shortly thereafter, an Amended Summary Judgment in favor of the City upholding the ordinance in its entirety, relying upon its previous decision in *Florida Businessmen For Free Enterprise, Inc. v. Hollywood*, No. 80-6157-Civ-NCR (S.D. Fla. 8/29/80). (A. 31-32; 35-45).

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the lower Court's judgment citing its opinion in *Florida Businessmen for Free Enterprise, Inc. v. Hollywood*, in which, on April 23, 1982, it upheld a similar ordinance in its entirety. (A. 46-79).[8]

Treatment of the Issues in the Court Below

The issues before this Court were raised as part of the Petitioners' multi-faceted attack in the Federal District and Circuit Courts against the Homestead Ordinance.

The central issues focused on the definitional phrase "designed for use", the meaning of this phrase and whose intent was necessary to support a finding of guilt.

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[8]Therefore, throughout this Brief discussion of the 11th Circuit's reasoning of its affirmance will be through reference to its opinion in *Florida Businessmen for Free Enterprise, Inc. v. Hollywood, supra.*

The Eleventh Circuit concluded that this phrase as contained in the definition portion of "drug paraphernalia", does not permit a conviction based upon the transferred intent of another. The Court reasoned that three states of mind on which the definition of drug paraphernalia relies (1) "used," (2) "intended for use," or (3) "designed for use" require proof of general criminal intent of the accused.[9]

The Eleventh Circuit also found that the phrase "designed for use" is not vague in failing to warn the merchants whether items capable of lawful uses are within the ordinance's prohibitions. The Court concluded that the "designed for use" standard encompasses items principally used with illegal drugs as determined by the objective physical features of the object in conjunction with the intent or plan of the manufacturer.[10]

The Court then addressed the indicium of criminal intent which "may be considered" in rendering an object drug paraphernalia; that is, "[w]hether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products . . . ." The Court upheld this provision on a basis that this indicium attempts to distinguish "head shops," the subject

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[9]*Florida Businessmen for Free Enterprise, Inc. v. Hollywood, supra*, slip op. at 961; (A. 61).

[10]*Id.*, slip op. at 963; (A. 60).

of the ordinance, from other retail establishments which might sell objects with both innocent and prohibited uses. Noting that this element was struck by the Circuit Court of Appeals, Sixth Circuit in *Record Revolution No. 6, Inc. v. The City of Parma*,[11] the Court here agreed "that the risk of discriminatory enforcement inherent in this language is more than slight." It nevertheless precluded the merchants from raising this claim in a pre-enforcement proceeding.[12]

The Circuit Court declined to find the "reasonably should know" indicium of criminal intent in the definition of drug paraphernalia and the violations section of the ordinance unconstitutionally vague, or that this standard does not require specific intent of the accused for a conviction. The Court found that this standard does not punish innocent conduct, but establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.[13]

Finally, the District Court held that the prohibition on advertising does not embrace protected non-commercial speech; that is, it does not address advertisements commenting upon the wisdom or efficiency of drug paraphernalia laws or any other matter. Rather, it merely

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[11]638 F.2d 916, 933 n.24 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103 (1981), *previous decision reaffirmed and reinstated*, Nos. 80-3308 and 80-3352, (6th Cir. 1/6/82), *vacated and remanded*, 102 S.Ct. 2227 (1982).

[12]*Florida Businessmen for Free Enterprise, Inc. v. Hollywood*, *supra*, slip op. at 963; (A. 64-65).

[13]*Id.*, slip op. at 962; (A. 63).

permissibly regulates the commercial marketing of items that may be used for an illicit purpose.[14] The Appeals Court rejected the view that the ordinance impermissibly applied to any advertiser regardless of where the advertisement is disseminated, as well as the contention that this prohibition is overbroad, holding that the State could ban commercial speech intended to encourage illegal activity.[15]

THE QUESTIONS ARE SUBSTANTIAL

I.

THE OPINION OF THE ELEVENTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND SEVENTH CIRCUIT COURTS OF APPEALS AS WELL AS OTHER FEDERAL COURTS INVALIDATING LAWS BASED UPON THE MODEL ACT

The controversy over the constitutionality of the Model Act is plainly ripe for resolution by this Court. The decision underlying the Eleventh Circuit Court of Appeal's affirmance upholding the Model Act is in direct conflict with the opinion of the Sixth Circuit Court of Appeals in *Record Revolution No. 6, Inc.*, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103 (1981), *previous decision reaffirmed and reinstated*, Nos. 80-3308 and 80-3352 (6th Cir. 1/6/82), *vacated and remanded*, 102 S.Ct. 227 (1982). Further, this decision is in direct conflict with that of the Seventh Circuit *in Record*

[14]Id., slip op. at 959; (A. 57).

[15]Id., slip op. at 960; (A. 57).

Head Corporation v. Sachen, et al., 498 F.Supp. 88 (E.D. Wis. 1980), *affirmed in part and reversed in part*, No. 80-2518, (7th Cir. 7/7/82).

Second, litigation over the Model Act has resulted in several Federal Circuit Court decisions, falling on all sides of the question. Those cases which have upheld laws based upon the Model Act include: *New England Accessories Trade Association, Inc. v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982); *High Ol' Times, Inc. v. Busbee*, No. 81-7019 (11th Cir. 4/23/82); *Brache v. County of Westchester*, 658 F.2d 47 (2nd Cir. 1981) and *Casbah, Inc. v. Thone*, 651 F. [illegible]51 (11th Cir. 1981), *cert. den.* 50 U.S. L.W. 3713 (3/8/82).

Further litigation involving the Model Act has spawned a multitude of District Court decisions also falling on all sides of the issue.[16] Those cases which have ruled adversely to the Model Act include: *Franza v. Carey*, 518 F.Supp. 324 (S.D.N.Y. 1981); *Information Management Services, Inc. v. Borough of Pleasant Hills*, 512 F.Supp. 1066 (W.D. Pa. 1981); *Weiler v. Carpenter*, 507 F.Supp. 837 (D. N. Mex. 1981); *General Store, Inc. v. City of Albuquerque*, No. 81-0027-M, Civil (D. N. Mex. 3/23/81); *Lazy J., Ltd. v. Borough of State College*, Civ. No. 80-1167 (M.D. Pa. 1/30/81).

A second group of District Court decisions upheld the Model Act after severing portions of the law in question: *Lady Ann's Oddities, Inc. v. Macy*, 519 F.Supp. 1140 (W.D. Okla. 1981); *New England Accessories Trade Association v. Browne*, 502 F.Supp. 1245 (D. Conn. 1980)

[16] In *Calhoon v. Harvey*, 379 U.S. 134, 137 n.10 (1964), this Court took note of conflicting views among the district circuit courts in determining to grant certiorari.

appeal docketed No. 81-7142 (2nd Cir. 2/24/81); *Stoianoff v. Montana*, 529 F.Supp. 1197 (D. Mont. 1981) and *Stoianoff d/b/a the Joint Effort v. Montana*, C.V. 81-140-M (D. Mont. 9/30/81), appeals docketed Nos. 82-3010 and 82-3024 (9th Cir. 1/8/82) (oral argument had on September 9, 1982); *New England Accessories Trade Association v. Tierney*, 528 F.Supp. 404 (D. Me. 1981) appeal docketed, No. 81-1886 (1st Cir. 12/21/81) (all briefs filed); *Kansas Retail Trade Cooperative v. Stephan*, 522 F.Supp. 632 (D. Kan. 1981), appeal docketed No. 81-2162 (10th Cir. 10/7/81) (all briefs filed); *Windfair, Inc. v. Busbee*, No. Civ. C-81-460-A (N.D. Ga. 9/8/81).

A third line of District Court decisions have upheld laws based upon the Model Act; *Nova Records, Inc. v. Sendak*, 504 F.Supp. 938 (S.D. Ind. 1980), appeal docketed No. 81-1107 (7th Cir. 1/22/81); *Tobacco Accessories and Novelty Craftsmen Merchants v. Treen*, 501 F.Supp. 168 (E.D. La. 1980); *Mid-Atlantic Accessories Trade Association v. Maryland*, 500 F.Supp. 289 (D. Del. 1980); *World Imports, Inc. v. Woodbridge Township*, 439 F.Supp. 428 (D. N.J. 1980), *appeal dismissed* No. 80-1851 (3rd Cir. 9/17/80); *Atkins v. Clements*, No. Civ. 4-81-459-K (N.D. Tex. 9/24/81), *appeal dismissed*, No. 81-1475 (5th Cir. 12/22/81); *General Store, Inc. v. Bingaman*, No. Civil-80-0330 (D. N.M. 6/12/81), appeal docketed, No. 81-1681 (10th Cir. 6/23/81) (all briefs filed).

II.

THE ISSUES PRESENTED ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

The Drug Enforcement Administration of the United States Department of Justice drafted the Model Drug Paraphernalia Act which has resulted in legislation by at least 26 states patterned after the Model Act. Further, a resolution of the conflict between the Eleventh Circuit on the one hand, and the Sixth and Seventh Circuits on the other hand regarding the constitutionality of these laws will have a substantial impact upon merchants in states and municipalities across the nation.

This Court's recent decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S.Ct. 1186 (1982), is not dispositive of the issues before us. This is so for several reasons. The Hoffman Regulation is a civil licensing law, not a criminal law.[17] Any item may be sold to an adult, so long as a license has been obtained. Sales of "drug paraphernalia" without a license are subject only to a fine.[18]

Moreover, the Village of Hoffman Estates has adopted administrative procedures under which any interested person may seek clarification of the meaning and application of any licensing ordinance from the Village.[19] The Ordinance here has no available similar administrative procedures.

The Hoffman Regulation prohibits only the sale of "drug paraphernalia" without a license.[20] Unlike the

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[17] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra*, 102 S.Ct. at 1190, 1193-94.

[18] Hoffman Regulation, §3; *Id.* at 1197.

[19] *Id.* at 1190, n.4.

[20] Hoffman Regulation §1(A); *Id.* at 1194.

Homestead Ordinance, the Hoffman Regulation does not attempt to regulate the possession or use of "drug paraphernalia." That, in conjunction with other provisions of the Hoffman Regulation,[21] makes it clear that, unlike the Homestead Ordinance, the Hoffman Regulation was intended to regulate only sales by businesses.[22]

The Hoffman Regulation controls the sale of items which are "designed or marketed for use with illegal cannabis or drugs."[23] The phrase "designed . . . for use" is the only material portion of the Hoffman Regulation which has a direct counterpart in the Homestead Ordinance. The "marketing for use" standard in the Hoffman Regulation is not found in the Homestead enactment, and the "used" and "intended for use" terms in the Homestead Regulation are not found in the Hoffman Regulation.

Licensing guidelines prepared by the village attorney[24] lists specific items which are "conclusively designed" for use with illegal drugs and are therefore covered by

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[21] *See* Hoffman Regulation §§ 1(b) (referring an "employee"), 1(D) (requiring that records be kept and be open to inspection "during hours of business"), 1(E) (requiring compliance with regulations of the Health Department), Id. at 1197).

[22] *See Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., supra*, at 1189. ("the ordinance in question requires a business to obtain a license. . . .").

[23] *Id.* at 1190.

[24] *Id.* at 1190, & n.3.

the Hoffman Regulation.[25] The list of items which are inclusive of but not determinative of whether an object constitutes "drug paraphernalia" in the Homestead Ordinance[26] is not comparable in the least to those contained in the Hoffman guidelines.

The ordinance's list of evidentiary factors which law enforcement officers, judges and juries may consider in determining whether particular items are illicit "drug paraphernalia" has no counterpart in the Hoffman Regulation. Finally, the Hoffman Regulation does not control advertising,[27] unlike the Homestead Ordinance.

Because this Court in *Hoffman* ruled upon the constitutionality of a civil licensing ordinance rather than a criminal law, the latter of which requires more stringent scrutiny and the application of different constitutional standards,[28] the issues presented herein should be settled by this Court.

A. THE PHRASE "DESIGNED FOR USE" RESULTS IN GUILT THROUGH TRANSFERRED INTENT OF THE DESIGNER, THUS DENYING AN ACCUSED VIOLATOR DUE PROCESS OF LAW

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[25] Id. at 1194, & n.18.

[26] Homestead Ordinance §29-58.1 D. 1.-12. (A. 4-6).

[27] *See* Hoffman Regulation §1(A), *Village of Hoffman Estates, v. Flipside, Hoffman Estates, Inc., supra*, at 1197.

[28] *See Grayned v. City of Rockford*, 408 U.S. 104, 110, (1972); *Smith v. Gougen*, 415 U.S. 566 (1974).

In *Village of Hoffman Estates, v. Flipside, Hoffman Estates, Inc., supra*, this Court concluded that the phrase "designed for use" was not unconstitutionally vague on its face. In addressing whether the retailer's intent or manner of display is relevant and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer", this Court stated: "[T]his term refers to the design of the manufacturer, not the intent of the retailer or customer." This Court heavily relied upon the "marketed for use" definition of drug paraphernalia to avoid a construction which would permit a retailer to be convicted based upon the intent of the designer

> *Whatever ambiguities the "design . . . for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise.* The guidelines referred to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. The retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. *The standard requires scienter,* since a retailer could scarcely "market" items "for" a particular use without intending that use.
>
> Under this test, Flipside had ample warning that its marketing activities required a license.

102 S.Ct. at 1195 (Emphasis supplied).

The Homestead Ordinance, unlike the Hoffman Regulation, does not contain the additional phrase "marketed for use," upon which the Hoffman Court so heavily relied. In an attempt to nevertheless overcome the constitutional attack, the Eleventh Circuit below held that a defendant may not be convicted based upon the transferred intent of others. Rather, concluded the Court, the three alternative states of mind on which the definition of drug paraphernalia relies—"use," "intended for use," or "designed for use"—require proof of general criminal intent of the accused.

It is well-established that a Court may not narrow a statute through construction in order to sustain it from constitutional attack, nor may a Federal Court rewrite a state statute.[29] The Eleventh Circuit took such impermissible action in construing the Homestead Ordinance. The definition of drug paraphernalia in the Homestead Ordinance is stated in the disjunctive; that is, "used, intended for use or designed for use". The Eleventh Circuit impermissibly construed a statute clearly written in the disjunctive as if it were drafted in the conjunctive, in an attempt to salvage it. This the Eleventh Circuit was not entitled to do. As the Seventh Circuit noted in *Levas v. Village of Antioch, Illinois*, No. 80-C-1574 (N.D. Ill. 4/22/80), *affirmed*, No. 80-1675 (7th Cir. 7/7/82):

> [We] recognize that *in the vagueness context, the canons of construction that would narrow a statute to avoid constitutional problems have*

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[29]*See Record Revolution No. 6, Inc. v. The City of Parma, supra*, 638 F.2d at 926, quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

> *no place.* [Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, 102 S.Ct. at 1191 n.6]. The statute must be construed to give full effect to any possible ambiguities.

slip op. at 11, *quoting Hoffman.*

It is indeed ironic that a decision upholding a drug paraphernalia ordinance best elucidates the unconstitutionality of the Homestead Ordinance as written. In *Hejira Corporation v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981), the Tenth Circuit relied upon the conjunctive nature of the three elements in the definition of drug paraphernalia in the ordinance before them, which points out the substantial difference between that enactment and the Homestead Ordinance (Model Act):

> It is well to remember that the Model Act and the Colorado Act are different. In the Model Act the definition of drug paraphernalia is stated in the disjunctive. Thus, the definition of drug paraphernalia in the Model Act encompasses items "used, intended for use or designed for use for illegal purposes." An item may constitute drug paraphernalia if any one of the three standards is met; that is, if the item is used, intended for use, or designed for use with illegal drugs, it constitutes paraphernalia. The definition of drug paraphernalia in the Colorado Act, however, is stated in the conjunctive. *Thus, an item may only constitute drug paraphernalia if it is intended for use and designed for use in one of the four enumerated ways. Regardless of whose*

intent the word "designed" refers to, the intent of the possessor or seller is still required by the words "and intended."

Id. at 1366-67.

The Eleventh Circuit and other Courts which have upheld Model Act Ordinances in the face of the instant attack have done so through an unworkable bootstrapping of the intent requirement contained in the violations provision.[30] These cases have "hinged the definition of drug paraphernalia on a specific intent to violate the Model Act Ordinances.

The salvaging attempt must fail for four reasons: (1) the Eleventh Circuit's determination that "designed for use" refers to the intent of the accused is in direct conflict with this Court's construction of that phrase in the Hoffman Ordinance. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 102 S.Ct. at 1195; (2) the phrase "designed for use" as used to define drug paraphernalia is vague; (3) the factors which may be considered in assessing the presence of criminal intent are vague; and (4) intent may be impermissibly found merely because one "reasonably should have known" that a violation would arise.

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[30] *See Casbah, Inc., v. Thone, supra,* 651 F.2d at 559; *Record Revolution No. 6, Inc., v. City of Parma, supra,* 638 F.2d at 928 & n.14; *New England Accessories Trade Association v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 844; *Delaware Accessories Trade Association v. Gebelein,* 497 F.Supp. 289, 292-93 (D. Del. 1980).

B. THE PHRASE "DESIGNED FOR USE" DEFINING "DRUG PARAPHERNALIA" IS UNCONSTITUTIONALLY VAGUE IN THAT THE MERCHANTS CANNOT TELL WHETHER ITEMS CAPABLE OF LAWFUL USES ARE WITHIN THE ORDINANCE'S PROHIBITIONS. FURTHER, SUCH VAGUENESS PERMITS ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

By the Homestead Ordinance, the Petitioners are able to establish that the "designed for use" standard is so vague as to specify no standard of conduct at all and thereby vague in all its applications, thus rendering the law invalid under Hoffman.[31]

This Court's determination that the phrase "designed for use" was not vague in all of its applications to the merchants therein was predicated upon licensing guidelines which listed several specific items as "conclusively 'designed' . . . for illegal use.[32] The evidence in that case establishes that those items were solely or principally useful with illegal drugs by virtue of objective physical features. *Id.* The Homestead Ordinance, in contradistinction, lists items which may, but do not necessarily constitute "drug paraphernalia".[33] Because

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[31] *Id.* at 1191 & nn.5 and 7.

[32] *Id.* at 1190 & n.3.

[33] Homestead Ordinance §29-58.1 D 1.12. (A. 4-6). *Id., quoting Indiana Chapter NORML, Inc. v. Sendak,* No. TH-75-142-C (S.D. Ind. 2/4/80), *vacated as moot at time of appeal,* No. 80-1305 (7th Cir. 7/22/80) (Citation omitted).

the Petitioners do not sell any items which "conclusively" or "necessarily" constitute drug paraphernalia, the ordinance does not clearly apply to some of their activities, unlike the unquestionable application of the ordinance to the specified items in *Hoffman*.

In *Record Revolution No. 6, Inc., v. Parma, supra*, 638 F.2d 916, 930, the Sixth Circuit noted why the "designed for use" definition of a controlled substance is unconstitutionally vague:

> It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the law] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Id., quoting Indiana Chapter NORML, Inc. v. Sendak, No. TH-75-142-C (S.D. Ind. 2/4/80), *vacated as moot at time of appeal*, No. 80-1805 (7th Cir. 7/22/80) (Citation omitted).

In addition, the Sixth Circuit held that the definition of drug paraphernalia in terms of "designed for use" presents the "danger of arbitrary and discriminatory enforcement of the ordinances by the police."

> This testimony suggests that the ordinances would be enforced only against "head shops," as designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement. Because the ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad.

Record Revolution No. 6, Inc. v. City of Parma, supra, 638 F.2d 916, 931.[34] Thus, the Eleventh Circuit here erred when it found and condoned the purposes of the Homestead Ordinance to be directed towards "head shops," saying:

> It is clear that this indicium attempts to distinguish "head shops", *the subject of this ordinance*, from other retail establishments

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[34] The determination of the arbitrary and discriminatory enforcement issue by the Sixth and Seventh Circuits, even absent an arrest, points to the error of the Eleventh Circuit in the case sub judice in declining to address this challenge. *See Record Revolution No. 6, Inc. v. City of Parma, supra; Record Head Corporation v. Sachen, supra*, slip op. at 10-11; *Levas v. Village of Antioch, Illinois, supra*, slip op. at 13.

which might sell objects within both innocent and prohibited uses.

The ruling below points out the vagueness of the Ordinance. To permit enforcement of the Ordinance only against "head shops" further demonstrates the bootstrapping nature of the definition of "drug paraphernalia" because the common definition of a "head shop" is a store that sells "drug paraphernalia." Thus, discretion is placed with police officers to determine whether otherwise innocent household items are "drug paraphernalia" depending upon the *a priori* determination by the same police officers as to which business establishments are "head shops." The circular logic is readily apparent. Further, the substantial danger of arbitrary and discriminatory enforcement by permitting police to make these determinations also renders the Homestead Ordinance unconstitutional.

C. THE FACTOR IN THE DEFINITION PORTION OF THE HOMESTEAD ORDINANCE WHICH PERMITS CONSIDERATION OF WHETHER ONE IS A "LEGITIMATE SUPPLIER" IN ASSESSING WHETHER HE HAS THE REQUISITE CRIMINAL INTENT IS UNCONSTITUTIONALLY VAGUE AND PERMITS ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

In *Record Revolution No. 6, Inc. v. City of Parma, supra*, the Sixth Circuit agreed with its lower Court's finding that the factor of being a "legitimate supplier" is both unconstitutionally vague and overbroad. 638

F.2d 916, 933, n.24, approving *Record Revolution No. 6, Inc. v. City of Parma*, 492 F.Supp. 1157, 1171 (N.D. Ohio 4/14/80).

This factor, which is both general and unweighted, invites inquiry into an area of doubtful relevance rather than making the prohibited conduct any clearer. *See Record Head Corporation v. Sachen, supra*, slip opinion at 8-9, 11. Thus, again, a vehicle for arbitrary and discriminatory enforcement is supplied by permitting law enforcement officers to determine whether an individual is a "legitimate supplier".

Although the Homestead Ordinance contains a severability clause,[35] it is clear that judicial surgery via such a clause may not be utilized to constitutionally "save" the entire ordinance if all portions of the ordinance's scheme are dependent upon one another and all are directed to achieve a common directive. *See Dorchy v. State of Kansas*, 264 U.S. 286 (1929). In the case at hand, the *Dorchy* principle precludes judicial surgery of the "legitimate supplier" provision, which is utilized to determine whether the requisite criminal intent exists. This is so because a non-legitimate supplier is, within the meaning of the ordinance, the same as a "head shop" owner. As acknowledged by the Eleventh Circuit below and as previously discussed under Issue B of this Petition, this ordinance is specifically aimed at the "head shop" owner. Whether one falls within this category is the result of an *a priori* determination of law enforcement personnel, who then utilize this classification to determine whether an item constitutes drug

[35]Homestead Ordinance §29-58.5, Sect.3. (A. 10).

paraphernalia. Because this provision is so interwoven with the remaining portions of the ordinance, the entire ordinance must fall.

D. THE PERMISSIBILITY OF A CONVICTION MERELY BECAUSE ONE "REASONABLY SHOULD KNOW" DENIES AN ACCUSED DUE PROCESS BY FAILING TO REQUIRE SPECIFIC INTENT.

The violations portion of the Homestead ordinance, in part, renders it unlawful to deliver or possess with intent to deliver "drug paraphernalia", knowing, or under circumstances where one reasonably should know it will be used in connection with controlled substances. Further, advertising where one knows, or under circumstances where one reasonably should know its purpose, in whole or in part, is to promote the sale of objects designed or intended for use as "drug paraphernalia" is prohibited.

Unlike the Homestead Ordinance, the Hoffman Regulation did not contain a "reason to know" standard of intent. Consequently, this Court did not have an occasion to discuss the constitutionality of such a provision. The Eleventh Circuit below concluded that this standard establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.[35] Such an unreasonably strained construction

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[35] *Florida Businessmen For Free Enterprise, Inc. v. Hollywood, supra*, slip op. at 962; (A. 63).

of this Ordinance is constitutionally impermissible.[37] As the Sixth Circuit noted in *Record Revolution, No. 6, Inc.*:

> The "reason to know" standard is vague and overbroad. The district court aptly remarked: "Defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual's ability to preceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged with the responsibility of enforcing it." *See also:* Knoedler v. Roxbury Township, 485 F.Supp. 990, 993 (D.N.J. 1980). . . . Detective Bennett testified that the police would not know how to enforce the "reason to know" standard. Because most uses of the outlawed items are lawful and common, the "reason to know" standard is too open-ended and susceptible to misapplication to satisfy the dictates of due process.[38]

E. THE AFOREMENTIONED PROHIBITION OF AN ADVERTISEMENT WHICH, IN WHOLE "OR IN PART," PROMOTES THE SALE OF OBJECTS DESIGNED OR INTENDED FOR USE

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[37] *See* pp. 16-17 of this brief, *supra*.

[38] 638 F.2d at 935-36 (Footnotes omitted). This language has been struck as unconstitutional by several other Federal Circuit and District Courts as well: *Levas v. Village of Antioch, Ill.; New England Trade Assn. v. Browne; Stoianoff v. Montana, supra*.

AS "DRUG PARAPHERNALIA" IS OVERBROAD IN ITS INFRINGEMENT UPON PROTECTED POLITICAL SPEECH, AS WELL AS ITS LACK OF GEOGRAPHIC LIMITS ON ITS APPLICABILITY.

The Homestead Ordinance prohibits advertising which promotes, *in whole or in part*, the use or sale of "drug paraphernalia."[39] The Eleventh Circuit again engaged in a contorted construction of the statute, ignoring the clear language "in part", in concluding that the ordinance does not include any speech other than the commercial marketing of items that may be used for an illicit purpose.[40] This analysis would require us to accept a legal fiction; that is, that one who is prosecuted for an advertisement which condemns the anti-drug paraphernalia ordinances, discusses the appropriateness of legal reform *and* which also offers "drug paraphernalia" for sale within the same ad will be prosecuted only for the latter conduct. This is a distinction without a difference inasmuch as the criminal sanctions remain the same regardless of whether the protected political speech was contained in the advertisement.

The Court did not address this issue in *Hoffman* where only the sale of items displayed near literature, not the literature itself, was regulated.[41]

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[39]Homestead Ordinance §29-58.4.; (A. 9).

[40]*Florida Businessmen For Free Enterprise, Inc. v. Hollywood, supra*, slip op. at 959; (A. 57).

[41]*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra*, 102 S.Ct. at 1190, n.2 & 1192.

Based upon the same reasoning, the Eleventh Circuit's conclusion that only commercial speech which promotes illegal drug use is prohibited by the Homestead Ordinance must fail. As previously noted, the Hoffman Regulation did not contain the "in part" language at issue here. Consequently, this Court did not have an opportunity to address this issue.

The ban of the Homestead Ordinance, unlike that of the Hoffman Regulation, reaches beyond the geographic boundaries of the City of Homestead. The Ordinance reaches speech promoting the sale of items which the City might consider to be "drug paraphernalia" and other cities which legally permit the sale of such items. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court invalidated a state statute which prohibited the dissemination of information encouraging or promoting abortions. Despite the fact that the State of Virginia prohibited abortions and advertising relating thereto, this Court concluded that an editor of the Virginia Newspaper could not be convicted for printing an advertisement concerning abortion services which were legal in the State of New York. *Id.* at 822-24. *Accord Memphis Publishing Co. v. Leech*, 539 F.Supp. 405, 410-11 (W.D. Tenn. 1982).

The prohibition of the Homestead Ordinance is as geographically broad in scope as the statutes in *Bigelow* and *Memphis Publishing*. Because the ordinances prohibit advertisements which contain, in part, protected speech which concerns lawful activity, and its scope is not limited to advertisements with the sole purpose of promoting commercial transactions, the ordinance infringes upon speech protected by the First Amendment. While the Court in *Record Revolution No. 6, Inc. v. City*

of Parma, supra, concluded that the regulatory interests of the cities in stopping drug abuse is substantial and that the ordinances advance that interest, it properly held that their scope was more extensive than necessary to serve that interest. 638 F.2d at 947. *Accord, Kansas Retail Trade Cooperative v. Stephan; Stoianoff v. Montana, supra.* For these reasons, the Homestead Ordinance should be stricken as violative of the First Amendment to the United States Constitution.

CONCLUSION

The questions presented by this Petition for Review reflect a conflict among the Federal Circuit Courts of Appeals and present important questions of Federal law which have not been but should be settled by this Court. Consequently, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED,

DEBORAH J. MILLER, Esquire
Counsel of Record
Simon, Schindler & Hurst, P.A.
1492 South Miami Avenue
Miami, Florida 33130
305/358-8611

ROBERT T. VAUGHN, Esquire
Of Counsel
1111 Stahlman Building
Suite 1111
Nashville, Tennessee 37201
615/242-2550